

192

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE
R.S.O. 1980, c. 340, as amended

IN THE MATTER OF the Complaint by Ms. Patricia Winterburn of Milton, Ontario, alleging discrimination in employment by Lou's Place; their agents and servants; Mr. L. Nadlin, and Mr. L. Sheppard, 3153 Steeles Avenue West, Milton, Ontario, on the basis of sex, contrary to Section 4 (1) (b), (f) and (g) of the Ontario Human Rights Code, Revised Statutes of Ontario, 1980, Chapter 340, as amended.

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BOARD OF INQUIRY

Professor Frederick H. Zemans

Appointed a Board of Inquiry
in the above matter by the Minister of Labour,
Honourable R. H. Ramsay

Appearances:

Ms. Bella Fox

Counsel for the Ontario
Human Rights Commission
and Complainant

Mr. Peter Winn, Esq.

For the Respondents

Ms. Patricia Winterburn was employed by Lou's Place, a drinking establishment in Milton, Ontario from August 1980 until October 17th, 1980 as a bartender. On the latter date, she was informed by Mr. Larry Sheppard, the manager of Lou's Place, that her position was terminated as of that date. Ms. Winterburn subsequently filed a complaint with the Ontario Human Rights Commission that she had been discriminated against in her employment on the ground of sex contrary to section 4(1)(b)(f)(g) of the Ontario Human Rights Code, R.S.O. 1980, c. 340 as amended. The relevant sub-sections read as follows:

4(1) No person shall,

...

(b) dismiss or refuse to employ or to continue to employ any person;

...

(f) maintain separate lines of progression for advancement in employment or separate seniority lists where the maintenance will adversely affect any employee; or

(g) discriminate against any employee with regard to any term or condition of employment because of ... sex, ... of such person or employee.

It is to be noted that the complaint form signed by Ms. Winterburn contained details only in regard to her lay-off on October 17th, 1980. During the hearing, however, other incidents were referred to and I shall address myself to the issues raised by them, as well as to the lay-off of October 17th, 1980.

Summary of Fact

The complainant in this matter, Patricia Winterburn, is a twenty-eight-year-old married woman, with two daughters. She graduated from secondary school in 1972 and in 1978 completed a sixteen-week course in bartending at Mohawk College in Stoney Creek. From November of 1978 to May of 1980, she worked as a bartender and waitress for the Charles Hotel in Milton. In this permanent part-time position, Ms. Winterburn worked between twenty-four and thirty hours per week, usually on Thursday, Friday and Saturday evenings. Ms. Winterburn worked in two bars at the Charles; she began as bartender and waitress in the Trident Lounge and was transferred to a bartending position in the Beverage Room. Ms. Winterburn testified that on Friday and Saturday evenings, the Beverage Room was filled to its capacity of approximately 250 persons and that she was the sole bartender in this area on these shifts.

While employed at the Charles Hotel, Ms. Winterburn saw an advertisement in the Milton Champion newspaper for a bartender at Lou's Place, a new bar that was opening in Milton. She applied in person for the position. She was interviewed at the beginning of May, 1980, by either Steve Curtis or Hubert Tarzia and was hired at that time. Ms. Winterburn testified that the management of Lou's Place told her that they expected that bar to open in June, or possibly at the beginning of July, 1980. Ms. Winterburn terminated her

employment with the Charles Hotel so as to be available for work at that time.

Lou's Place was owned and operated by 337376 Ontario Limited, a company which was in turn owned by Mr. Lou Nadlin of Milton. This company also includes catering and vending operations. Mr. Larry Sheppard testified on behalf of the respondent. Mr. Sheppard was, and continues to be, in mid-1980, the general manager of 337376 Ontario Limited, and in this capacity, he helped Lou Nadlin build Lou's Place, advertised for and supervised hiring of seven staff, and oversaw general operations of the nightclub. It was Mr. Sheppard who gave Mr. Curtis and Mr. Tarzia the authority to interview bartenders.

Lou's Place encountered unforeseen difficulties in obtaining its liquor licence, which delayed the opening of the bar. Ms. Winterburn testified that she did not do any work for Lou's Place until the end of August, when she helped set up the bar and did some waitressing.

During the period between the end of her employment at the Charles Hotel and the commencement of her employment at Lou's Place, Ms. Winterburn worked Friday and Saturday evenings at the Bay Rischer-Hof Restaurant. This restaurant has a capacity of approximately 250 persons, and Ms. Winterburn testified that generally on Saturday nights, it was full.

Sometimes, Ms. Winterburn was the sole staff member on the bar; at other times, depending on whether or not the hall was booked for private parties, she had an assistant who washed glasses and opened bottles of beer.

During this period, Ms. Winterburn checked in periodically at Lou's Place, to find out when it was expected to open. She testified that the management did not realize at that time that she had been hired as a bartender and that they misplaced, for a time, Ms. Winterburn's application. Ms. Winterburn testified that on one of these visits, she met Mr. Sheppard. Mr. Sheppard was under the impression that she was applying for a waitress position, and she told him that she had been hired for a bartending position. She testified that Mr. Sheppard said, 'Well, that is impossible because we are not hiring women bartenders, we are only hiring men bartenders.' (Evidence, p. 25) Mr. Sheppard testified that he had never received any instructions from Lou Nadlin to deter women acting as bartenders, and, indeed, that Mr. Nadlin was "all for" women bartenders. (Evidence, pp. 114-115)

Ms. Winterburn's job application was eventually found. That application had 'hired' printed on it. Ms. Winterburn was given a bartending position, and when Lou's Place appeared before the Ontario Liquor Licencing Commission, Ms. Winterburn was presented as the person who would be responsible for the bar. (Evidence, p, 60)

During the same week as he confirmed Ms. Winterburn's employment, Mr. Sheppard testified, he hired a second bartender, Stuart Scott. Mr. Scott commenced employment approximately two weeks after the bar opened. Ms. Winterburn testified that until Mr. Scott commenced his duties, she worked double shifts at Lou's Place. After Mr. Scott began work, Ms. Winterburn worked Monday, Tuesday and Wednesday evenings from 6:00 p.m. to 1:00 a.m., and Thursday and Friday from noon to 6:00 p.m., while Mr. Scott worked the alternate shifts and Saturday evenings. Although in cross-examination Ms. Winterburn admitted that in general, Mr. Scott had the busier shifts, she stated that she had chosen her shifts to accommodate her daughter's nursery school classes. (Evidence, p. 73)

Mr. Sheppard testified that Mr. Scott and Ms. Winterburn were seen as occupying different positions at Lou's Place:

They were two separate jobs. There was no affiliation in the amount of work or the duties that were being handled by the parties.

Mr. Scott was hired with the intention of eventually becoming the assistant manager. He was also hired to bounce. If we had a problem we needed a man there, he was there....

There was no comparison in the jobs.

(Evidence, p. 158)

These were given as the reasons for the discrepancy between the salaries of the two bartenders; Ms. Winterburn was paid \$5 per hour, while Mr. Scott received \$6 per hour. (Evidence, p. 158)

Ms. Winterburn testified that her duties at Lou's Place were comparable to her duties at the Charles Hotel and the Bay Rischer-Hof:

It (her work) is the same, making cocktails, pouring draft, opening bottles of beer. It would be the same work at the Charles, and the Bay Rischer-Hof, and any establishment.

(Evidence, p. 39)

Her work at Lou's Place did not involved heavy lifting. While at the Bay Rischer-Hof she restocked the bar refrigerators herself, at Lou's Place, the refrigerators were re-stocked by other staff. (Evidence, p. 39)

Initially, Ms. Winterburn testified, Lou's Place was busy during her shifts, but not full to capacity. In October, the management introduced a weekly amateur talent night; and this increased business on Wednesday nights. Ms. Winterburn estimated that approximately 200 to 250 people would be in attendance on these busy evenings. Ms. Winterburn testified that she worked approximately three or four talent nights. Sometimes Ms. Winterburn operated the bar on her

own, and sometimes an assistant would help her with simple chores such as washing glasses. (Evidence, p. 24)

Ms. Winterburn worked at Lou's Place until October 17th, 1980. Her supervisor, Mr. Larry Sheppard, testified that he has no complaints with Ms. Winterburn's work performance:

Q. (by Mr. Winn) Did you have an opportunity during your course as manager of the company to observe Ms. Winterburn and her performance as bartender?

A. (by Mr. Sheppard) Yes, I did.

Q. Up until the 17th of October, 1980, did you have any cause for complaint?

A. None at all.

Q. Did she appear to be able to handle the task of the daytime bartender?

A. Yes.

Q. How would you describe your professional relationship with her?

A. I think we operated on an even keel. We seemed to get along. I had no problems with her. She seemed to be doing her job.

Mr. Sheppard specifically testified that he had no complaints about Ms. Winterburn's performance on the busier amateur nights on Wednesday evenings. (Evidence, p. 160)

Lou's Place was not as financially successful as its management had anticipated. Early in October, 1980, Mr. Sheppard began discussing with Lou Nadlin, the sole shareholder in 337376 Ontario Limited, how to lower expenditures at Lou's Place, to provide a better return on investment. To this end, they began to lay off staff. On October 13th, 1980, they laid off Ms. Dianne Lee, a part-time waitress. On October 17th, 1980, Ms. Winterburn was laid off.

Ms. Winterburn's and Mr. Sheppard's testimony differ concerning the particulars of her layoff. Ms. Winterburn testified that she was approached by Mr. Sheppard, who was concerned about the volume of business. He later returned and informed her that she was being laid off for lack of business. (Evidence, p. 26) Ms. Winterburn testified that she was not offered part-time work as a bartender, nor a cut in pay, but was simply laid off. She admitted in cross-examination that she was offered a waitressing position, but because of her weight and the fact that the waitressing position required wearing a relatively revealing uniform, she stated that she did not take this offer seriously. Ms. Winterburn testified that had she been offered an alternative position, alternative hours, or less wages, she would have accepted an alternative arrangement.

Ms. Winterburn was pregnant at this time. She had informed the management of her pregnancy approximately two weeks before her layoff, and there was no indication at that time that her pregnancy would be a problem. She testified that at the time of her layoff, Mr. Sheppard informed her that her pregnancy precluded her part-time work:

Q. (by Mr. Winn) Did he give you an opportunity to work part-time?

A. (by Ms. Winterburn) He gave me nothing whatsoever. He told me that I was laid off, and that was it.

Q. Did you question him why you were not getting a part-time offer or why the part-time bar keeper at nights, why you were not offered this job?

A. I asked about that, and he said that it would be too much for me because I was pregnant.

Q. Did you feel this to be the case?

A. No.

Q. What did you say when he indicated to you that he thought it would be too much for you?

A. I just said, 'well, you're not even giving me a chance to try it.'

Ms. Winterburn had suffered from morning sickness, for which she was hospitalized, prior to her layoff, but she testified that she did not believe that her pregnancy affected her

performance on the job. (Evidence, p. 50)

Mr. Sheppard testified that the pregnancy was not an issue in his decisions concerning Ms. Winterburn's employment:

Q. (by Mr. Winn) Now, can you tell us, please, and take your time in answering if it is required, whether or not the fact that you found Ms. Winterburn to be pregnant in any way affected your opinion of her qualifications to continue as a bartender?

A. (by Mr. Sheppard) I don't need any time. No, it did not affect my thinking at all. It didn't bother me in the least that she was pregnant.

Q. All right. Did this ever have any bearing at all in laying her off in any way ...?

A. No, sir.

Q. ... From your point of view?

A. Not at all.

(Evidence, p. 132)

Mr. Sheppard recalls only one conversation with Ms. Winterburn the day of her layoff. He testified that he told Ms. Winterburn that he was having to decrease the expenditures at Lou's Place and that her position would be terminated. He further testified that only after Ms. Winterburn had refused his offers of other employment, was she laid off:

Q. (by Mr. Winn) Did you have any further discussions with her during this conversation as to any possible alternatives that may have been involved?

A. (by Mr. Sheppard) Yes, I did.

Q. All right. What were those?

A. Number one, I said to Mrs. Winterburn that I didn't know if I could get this okayed or not but would she work the bar for \$4.00 per hour.

Q. What hours would this entail?

A. The same hours.

Q. The same hours she had been working?

A. She had been working, yes.

Q. Was she able to give you an indication at that time as to what her response would be?

A. Yes, she did respond to it.

Q. What did she say?

A. She said, 'no, I don't think I could take a cut for the job I am doing. It is worth all of \$5.00 per hour.'

Q. All right. Were any other alternatives or alternative suggested to her at that time?

A. Yes, there were.

Q. What was that?

A. The second alternative was that she would work the heavier hours at night.

Q. Which nights would these entail?

A. They would entail Thursday, Friday and Saturday.

Q. In what capacity there would she be?

A. Bartender.

Q. Part-time or full-time?

A. It would be a part-time position.

Q. All right. What rate of pay would she be paid for this work?

A. The same rate.

Q. \$5.00 per hour.

A. Yes.

Q. What was her response to that suggestion?

A. She told me she didn't think she could handle it.

Q. What did she base that upon, did she say?

A. She was not feeling well; it was just too much for her.

(Evidence, pp. 129-131)

While Ms. Winterburn testified that she kept her anger primarily to herself during her conversations with Mr. Sheppard at the time of her layoff, Mr. Sheppard testified that Ms. Winterburn "let him know she was not happy."

(Evidence, p. 120) Ms. Winterburn testified that later that evening, she had an argument with her husband about the layoff. She testified that she and her husband were both angry; they believed that she had been the victim of sexual discrimination, and they were upset because they realized

that the layoff was likely to cause financial hardship for them. Subsequently, Ms. Winterburn lodged a complaint to the Ontario Human Rights Commission on October 27th, 1980.

Following her layoff, Ms. Winterburn sought both bartending and other positions with a total of fifteen employers. (Exhibit 9) She was able to secure part-time employment at the Bay Rischer-Hof. Her duties were the same as her previous employment at that restaurant, but following her layoff from Lou's Place, her services were required only on Saturday nights. She thus worked eight to eight-and-a-half hours per week. Her hourly wage, however, was raised to \$6.00. Ms. Winterburn held this position until the end of February, 1981, when she was entering her eighth month of pregnancy.

Approximately two weeks after her layoff by the defendants, Ms. Winterburn noticed a posting at the local Canada Manpower Centre for the position of bartender at Lou's Place. The terms of duty listed on the notice were "Permanent - 12 noon - 6 p.m. + some weekends and evenings. Up to 44 hour week". (Exhibit 7) Upon the advice of her employment counsellor, Mrs. Bates, she applied for the job.

Ms. Winterburn was interviewed for the position by Ms. Jennifer Hickson, the head waitress of Lou's Place.

Ms. Winterburn testified that Ms. Hickson stated, 'Well, you're pregnant. We don't want you here. We want a man for the job.' (Evidence, p. 30) Ms. Hickson approached Mr. Henry Nadlin, who had succeeded Mr. Sheppard as manager, to ask him to speak to Ms. Winterburn. Mr. Nadlin was at this time involved in a discussion. Ms. Winterburn testified that, "Jennifer Hickson went over and talked to him for a few minutes and when she came back she said that Henry didn't want to see me." (Evidence, p. 101)

Mr. Sheppard testified that the posting of the notice with the Canada Employment Centre had been an error. Because the restaurant received a large number of reservations for the holiday season, Henry Nadlin had assumed that another bartender would be required. Mr. Sheppard testified that when he found out about the notice, he informed Mr. Nadlin and told him that a new bartender wasn't needed. (Evidence, p. 130) The position was never filled.

Mr. Sheppard testified that following the departure of Ms. Winterburn, several other women had tended the bar at Lou's Place. Ms. Lydia Seelan, a waitress at Lou's Place, covered the bar as part of her waitressing duties for about a year, starting in late October 1980. She was not paid in excess of her \$3.25 per hour wage as a waitress for these extra bartending duties.

Ms. Lorraine Daly was hired as a part-time bartender, and commenced employment during the week of October 27th to November 2nd. She continued to work in this position for four weeks, until she was transferred to a waitressing position at her request. Mr. Sheppard testified that Ms. Daly commenced employment at a wage of \$5.00 per hour, and was later reduced to \$4.00 per hour. (Evidence, p. 136)

Mr. Sheppard testified that Ms. Winterburn's position was eliminated as an economy measure. He testified that by working her shifts himself, 337376 Ontario Limited saved all of Ms. Winterburn's wages as he received no additional remuneration. He testified that other aspects of this attempt to prune expenses were the elimination of Diane Lee's waitressing position and the reduction in Mr. Scott's hours.

Mr. Scott left his employment at Lou's Place after Ms. Winterburn was laid off but his hours appear to have been somewhat reduced as the five-week period of his employment came to an end. In his second, third and fifth weeks at Lou's Place, he worked thirty-eight, forty-five and twenty-and-a-half hours respectively; during his last week, following Ms. Winterburn's layoff, he worked thirty-three-and-a-half hours. (Exhibit 6)

Accordingly, I must address myself to the following issues:

- 1) Was Ms. Winterburn discriminated against (on the basis of sex) in the hiring process, either initially or when she re-applied for the position in November 1980?
- 2) Was Ms. Winterburn discriminated against when she was laid off on October 17th, 1980?
- 3) Was Ms. Winterburn discriminated against if she was not offered alternative employment with Lou's Place when she was laid off on October 17th, 1980?

I must determine whether, on the balance of probabilities, the answer to any of the above questions is "yes"; I understand the test to be that if I find that the fact that Ms. Winterburn is a woman was at all a factor in the decision of Lou's Place to lay her off (or in relation to either of the other above questions); even if it was not the major factor, I must find that Ms. Winterburn was discriminated against by the Respondent on the basis of sex.

One other issue has been raised by this case in regard to offering Ms. Winterburn alternative employment and to the events surrounding her application of November 1980. That is whether her pregnancy was a factor in refusing her alternative employment (if indeed she was refused alternative employment) and in refusing to rehire her in November 1980.

If I were to find that it was, and that it had been specifically the reason for refusal in either or both of those instances, I would have to determine whether I can hold that such refusal because of pregnancy constitutes discrimination on ground of sex. It should be noted that while Ms. Winterburn's pregnancy is not referred to at all on her complaint, it was the subject of extensive testimony during the hearing, and implicitly, if not explicitly, appears to be the basis of Ms. Winterburn's claim of discrimination. It is therefore appropriate that I consider this issue.

In Bliss v. Attorney General of Canada (1978), 92 D.L.R. (3d) 417 (1 S.C.R. 183), the Supreme Court of Canada stated, in dictum, that discrimination on the ground of pregnancy does not constitute discrimination on the ground of sex. This case is distinguished from Bliss by the fact that the legislation involved is different. In Bliss, section 42 of the Unemployment Insurance Act was challenged under the Bill of Rights; it was also concerned with the phrase "equality before the law" in relation to a benefit provided by the Unemployment Insurance Act. Ms. Winterburn's complaint is brought under the Ontario Human Rights Code; I agree with the Tribunal Decision in Lorraine Tellier-Cohen v. Treasury Board ((1982), 3 CHRR D/792) that, as with the Canadian Human Rights Act, under which that case was decided, the Ontario Human Rights Code should be given a liberal

interpretation and that sex discrimination should be interpreted to mean discrimination because of pregnancy. In that respect, the Tribunal was upheld by the Review Tribunal ((1983), 4 CHRR D/1169). I find indirect support for this position in the liberal approach taken by Chairman Owen Shime in Bell v. Ernest Loda and the Flaming Steer Steak House ((1980), 1 CHRR d/155), and subsequent decisions in Ontario, in finding that sexual harassment falls within section 4(1) (g) of the Ontario Human Rights Code as discrimination in regard to a condition of employment. Since only women can become pregnant, discrimination because of pregnancy obviously can affect only women and can never affect men; therefore, discrimination because of pregnancy is simply one approach which discrimination on ground of sex can take.

I now address the questions listed above.

1.(a) The initial hiring

Ms. Winterburn was first hired in May of 1980 but because of delays in the opening of Lou's Place, she did not actually begin work until August of that year. In the meantime, she attended at Lou's Place to find out when she would commence work. Apparently, Mr. Larry Sheppard, the manager responsible for hiring, was unaware that Ms. Winterburn had been hired since she had in fact been hired

by persons other than Mr. Sheppard and her application form had been misplaced. Ms. Winterburn testified that Mr. Sheppard did not believe she had been hired as a bartender because he allegedly said, they were not hiring women bartenders. (Evidence, p, 15) Mr. Sheppard testified that the owner, Mr. Lou Nadlin, "was all for" hiring a woman bartender and had given no instructions to deter women from acting as bartenders. (Evidence, p. 115) Ms. Winterburn's application form was found with the word "hired" on it and she did commence work as a bartender; in light of that, I do not have to find whether Mr. Sheppard did in fact tell Ms. Winterburn that they were not hiring women bartenders.

1.(b) The "reapplication"

Two weeks, approximately, after Ms. Winterburn was laid off, she saw an advertisement for a bartending position at Lou's Place; this was a permanent position with hours from 12 noon to 6 p.m. and some weekends and evenings. (Exhibit 7) When Ms. Winterburn applied for the position, she testified that Ms. Jennifer Hickson, the head waitress (who was one of the persons to whom the application was to be made) told her that Lou's Place did not want Ms. Winterburn because she (Ms. Winterburn) was pregnant and they wanted "a man for the job". (Evidence, p. 30) No evidence was called to dispute Ms. Winterburn's testimony. Were I to find that

Ms. Winterburn had been refused the position for this reason, I would find that the Respondents were liable for the comment made by Ms. Hickson and that Ms. Winterburn had been refused the position on the basis of sex.

Evidence was led, however, that this advertised position was never in fact filled (Evidence, p. 122, 136 & 156) and had been advertised by mistake. (Evidence, p. 150) Mr. Sheppard testified that the hours in the advertisement were those previously worked by Ms. Winterburn (Evidence, p. 175), although as noted above, "some weekends" were also included. I find as a fact that this position was advertised in error and that the Respondent had not intended to hire another bartender and therefore cannot find that Ms. Winterburn was refused the position because of sex.

2. The Lay-off

I turn now to the events surrounding Ms. Winterburn's lay-off on October 17th, 1980.

It is agreed that Ms. Winterburn's work had been satisfactory and that there was no ground for complaint. (Evidence, p. 117) It is also agreed that Mr. Sheppard knew about Ms. Winterburn's pregnancy at the time he laid her off and had known about it for at least two weeks; Ms. Winterburn

had taken a short period of time off, apparently related to her pregnancy. On one of those occasions, she had been in hospital for the weekend, had been prepared to come to work Monday but took the day off on the suggestion of Mr. Sheppard. I find that as of October 17, 1980, Ms. Winterburn's pregnancy had not interfered with her work. I find further that although Mr. Winn, counsel for the Respondents, referred to the fact that Ms. Winterburn had experienced nausea during her first pregnancy, that there was no evidence to suggest this was known to Mr. Sheppard or to anyone else at Lou's Place nor that it was likely to affect Ms. Winterburn's work as a bartender.

Ms. Winterburn worked Monday, Tuesday and Wednesday nights from 6 p.m. to 1:30 a.m. and Thursday and Friday from noon until 6 p.m. She testified that she had chosen those hours because they were convenient, allowing her to pick up her daughter from nursery school. The alternate shifts, including Thursday, Friday and Saturday nights were covered by Mr. Stuart Scott who was the other full-time bartender. It was conceded by Ms. Winterburn on cross-examination that Mr. Scott would be busier during his hours than she would be during hers. (Evidence, p. 107) A part-time bartender, Mr. Merril Currie, came in on the weekend evenings to help Mr. Scott; he also came in on Wednesday evenings once they

got busier as a result of the introduction of amateur nights. Ms. Winterburn worked as the full-time bartender on Wednesday nights.

Mr. Scott had been hired subsequently to Ms. Winterburn's hiring and according to Mr. Sheppard, he had been hired on the understanding that he would become assistant manager. In fact, that did not happen, and Mr. Scott left Lou's Place not long after Ms. Winterburn had been terminated. It was this expectation and the fact that Mr. Scott acted as a bouncer which, according to Mr. Sheppard, explained the discrepancy in salary between Ms. Winterburn (who earned \$5.00 per hour) and Mr. Scott (who earned \$6.00 per hour). There is no mention in the complaint of this discrepancy and it was not relied on during the hearing and I therefore do not consider it a relevant factor for further consideration.

There is no dispute that the reason given by Ms. Sheppard for laying Ms. Winterburn off was economic. Ms. Winterburn testified that Mr. Sheppard told her there was a "shortage of work" and this was the term used on her separation certificate. (Exhibit 3) In her argument, Ms. Fox, counsel for the Human Rights Commission, suggested that this could not be considered the actual or real reason for the lay-off because the hours worked on the bar subsequently by various

persons indicated that there was considerable work available. I do not believe anything turns on the use of this phrase since I find it compatible with the explanation that Lou's Place found it necessary to make financial cuts. In so far as I find that Ms. Winterburn's position was never filled by a full-time person being paid for that particular work, I find that there was a shortage of work for a full-time paid bartender.

Mr. Sheppard testified that Lou's Place was having some financial difficulty in that it was not making the return expected on Mr. Lou Nadlin's investment and that he and Mr. Nadlin decided they had to cut costs. One of the part-time waitresses, Diane Lee, was terminated at approximately the same time and Mr. Sheppard stated that cuts were made in all areas.

The hours worked by Ms. Winterburn were covered by Mr. Sheppard who received no compensation above his usual salary; after about four weeks, Mr. Henry Nadlin (a nephew of Lou Nadlin) began to work the bar on the same terms when he took over as manager.

After considering all the factors, I have come to the conclusion that Ms. Winterburn's position was terminated

as a cost-cutting measure. The evidence is that the position was not subsequently filled full-time by a person paid specifically for that work. I note that a Mr. Gordon Sommers did work 18 hours and 26 hours on the bar during the weeks of December 18th and 23rd, 1980, respectively. I find nothing in the evidence to indicate that he was filling Ms. Winterburn's position and certainly by then Mr. Scott had left his employment as a full-time weekend bartender. Nothing contradicted Mr. Sheppard's evidence that he and Henry Nadlin filled the gap left by Ms. Winterburn at no extra cost to Lou's Place. I have no reason to disbelieve Mr. Sheppard's clear and unhesitant statement that Ms. Winterburn's pregnancy had no bearing on his decision to eliminate her job. (Evidence, p. 132)

Other women did perform the job as bartender after Ms. Winterburn was laid off from Lou's Place. Ms. Lydia Seelan, a waitress, worked on the bar during the afternoon, at \$3.25 per hour, the rate for a waitress. Ms. Lorraine Daley was hired to assist the bartender on the busy nights, first a \$5.00 and then at \$4 until she became a waitress at her request.

Mr. Sheppard's explanation for terminating Ms. Winterburn is consistent with all the facts in relation to her

specific position. The evidence supports the interpretation that the hours worked by Ms. Winterburn were less busy than those worked by Mr. Scott (and later by Mr. Henry Nadlin). Ms. Winterburn had chosen to work those hours herself and I find it was coincidence that she was working in the position terminated for financial reasons.

3. Alternative Employment

More difficult is the question of whether Ms. Winterburn should have been offered alternative employment by Mr. Sheppard and if she should have been, whether she was.

It is in regard to the latter issue that Mr. Sheppard's and Ms. Winterburn's testimony differ considerably. Ms. Winterburn states that Mr. Sheppard refused to consider her for part-time work because of her pregnancy; Mr. Sheppard, on the other hand, states that he did offer her alternative positions but that Ms. Winterburn refused them.

Mr. Sheppard was firm and clear in his recollection of this offer of alternatives. Ms. Winterburn, on cross-examination, did admit that she had been offered a waitress position (after testifying in chief that no alternative offers at all were made); she considered the waitress offer to be a joke since she was overweight at the time and would not look

"too cute" in a can-can outfit. She was a bartender: "that is what I had been trained for, and that is what I was hired to do". (Evidence, p. 95) While Ms. Winterburn did have to reverse her original testimony on this point, I accept that she did not consider this offer to be a reasonable offer of alternative employment as a bartender. Moreover, since the Respondents' base their position on several alternative offers (although they do not accept that there was an obligation to make such offers), they are not now in a position to condemn Ms. Winterburn for refusing this one.

Mr. Sheppard also testified that he offered her a job working the same hours at \$4.00 per hour, although he apparently could not guarantee the offer. Ms. Winterburn allegedly replied that the job was worth "all of \$5.00 per hour". (Evidence, p. 30) He further testified that he offered her work on Thursday, Friday and Saturday nights as a full-time part-time position at \$5.00 per hour but that Ms. Winterburn said "she didn't think she could handle it "because she was not feeling well."

Ms. Winterburn testified that she had raised the possibility of her working part-time but that Mr. Sheppard refused because she was pregnant. (Evidence, p. 48) She

said she would have taken the part-time position if it had been offered (Evidence, p. 37 and p. 45) and would have taken the \$4.00 per hour if it had been offered. (Evidence, p. 44). According to Ms. Winterburn, one of Mr. Sheppard's concerns was that she would not be able to do any heavy lifting but Ms. Winterburn testified that heavy lifting had not been part of her job. During cross-examination, Mr. Winn suggested that Ms. Winterburn had not had to stock beer because the volume during her hours was not sufficient to require restocking. This raises the question of whether there was any obligation on the part of Lou's Place to make reasonable accommodation for Ms. Winterburn's pregnancy in regard to the heavy lifting, if the ability to do heavy lifting were a bona fide occupational requirement of the job. General knowledge suggests that restocking is likely on busy nights but no evidence was led to indicate the capacity of the bar storage units, etc. in Lou's Place although Mr. Winn raised the need to restock during weekend evening hours. Assuming heavy lifting was necessary, it would not have been difficult to arrange that lifting be done by other people working the bar during those hours. (There seemed to be several; apart from Mr. Currie, Mr. Sheppard, Mr. John Nadlin, Mr. Henry Nadlin, Ms. Daley all helped out at various times during the busy evening hours. (Evidence, p. 136 and 156)) Reasonable accommodation appears to have been possible but was it required? Until the Divisional Court of Ontario decision in the case of

Ontario Human Rights Commission et al. v. Simpson Sears Ltd.

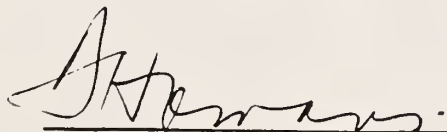
36 O.R. (2d) 59, 133 D.L.R. (3d) 611 upheld by the Ontario Court of Appeal 38 O.R. (2d) 423; it had been assumed that reasonable accommodation was required although it was not demanded by the Ontario Human Rights Code; now the legal status of reasonable accommodation has been thrown into doubt. In light of my findings, it is not necessary for me to discuss this decision at length.

Mr. Sheppard's testimony on the alternate offers was forthright; Ms. Winterburn is equally adamant that no such offers were made but her memory of the events is slightly questionable in light of her change in testimony in regard to the waitress offer. Although the reasons advanced by her for refusing that offer are understandable, it remains that she did not mention it at all, until reminded of it by Mr. Winn.

I must take into account that Ms. Winterburn did apply for the position advertised only two weeks after she was laid off; Mr. Winn stated in argument that that position was for the same hours she had been working, suggesting that therefore her application did not mean she was prepared to work the busy hours. In fact, the advertisement did refer to "some weekends and evenings" in addition to the noon to

6 p.m. hours; it was not clear whether the weekend hours were evenings or not. Furthermore, it is clear that Ms. Winterburn wanted to continue working as evidenced by her job application list. (Exhibit 9) On the other hand, she had chosen her hours in order to be available for her daughter and presumably, she would not be if she took the part-time position. This does not explain why she would refuse the cut in pay tentatively and allegedly offered by Mr. Sheppard. Mr. Sheppard explained her refusal by the fact she wanted the \$5.00 per hour she had been earning; no doubt it might be difficult for Ms. Winterburn to understand why she should take a cut in pay when she was already earning less than Mr. Scott (whose hours were supposed to be cut but were cut only minimally prior to his leaving Lou's Place).

After considering all the factors and the testimony of Mr. Sheppard and Ms. Winterburn, I must conclude that Mr. Sheppard did offer Ms. Winterburn several employment alternatives, which she refused. I do not need to decide whether Lou's Place had any obligation to make such offers. For the reasons given above I find that there has not been a contravention of Section 4(1)(b)(f) and (g) of the Ontario Human Rights Code and dismiss the complaint herein.



Frederick H. Zemans

The first part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The second part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The third part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The fourth part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The fifth part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The sixth part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The seventh part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The eighth part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The ninth part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself. The tenth part of the paper discusses the importance of the study of the history of the English language. It is argued that a knowledge of the history of the language is essential for a full understanding of the language itself.